No. 95-813

In the

Supreme Court of the United States

October Term, 1995

BRAD BENNETT, et al.,
Petitioners,

v.

MARVIN L. PLENERT, et al.,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals, for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CALIFORNIA FARM BUREAU FEDERATION, AND CALIFORNIA CATTLEMEN'S ASSOCIATION IN SUPPORT OF PETITIONERS

*ROBIN L. RIVETT
*Counsel of Record
MARK T. GALLAGHER
Of Counsel
Pacific Legal Foundation
2151 River Plaza Drive, Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888

Attorneys for Amici Curiae

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Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae on behalf of itself, the California Farm Bureau Federation, and the California Cattlemen's Association. Written permission from all parties to file this brief have been lodged with the Clerk of the Court.

INTEREST OF AMICUS CURIAE

The California Farm Bureau Federation (CFBF) is a nonprofit, tax-exempt corporation existing under the laws of the State of California. Its members are 53 county farm bureaus located throughout California through which it represents owners and operators of farms and ranches, as well as other residents of the state who are interested in the welfare of agriculture.

The California Cattlemen's Association (CCA), a nonprofit corporation, founded in 1917, represents the state's beef cattle industry in legislative and regulatory affairs. Beef cattle producers operate over 40 million of California's 100 million acres and contributed $1.5 billion to the state's $19.7 billion agriculture economy in 1993. The industry provides more than 26,000 jobs from the ranch level to the processing level in the State of California.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating in the public interest. PLF has over 20,000 supporters nationwide. Policy for PLF is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. PLF's Board of Trustees evaluates the merits of any contemplated legal action and authorizes such legal action only when the Foundation's position has broad support within the general community. PLF's Board of Trustees has authorized the filing of an amicus curiae brief in this matter.

PLF has participated in numerous cases involving the Endangered Species Act and has a history of helping landowners that have been injured by government action taken pursuant to the ESA. PLF was a party of record in *Pacific Legal Foundation v. Andrus*, 657 F.2d 829 (6th Cir. 1981), and the Foundation participated as amicus in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, ___U.S. ___, 63 U.S.L.W. 4665 (1995); *Douglas County, Oregon v. Babbitt*, Case No. 95-371; and *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978). PLF attorneys have

also litigated the issue of standing under environmental statutes. For example, PLF attorneys were counsel of record in *Gonzales v. Gorsuch*, 688 F.2d 1263 (9th Cir. 1982), a case which involved standing under the Clean Water Act's citizen-suit provision.

PLF seeks to augment the argument in the petition for writ of certiorari. PLF believes that its public policy perspective and litigation experience in support of economic rights will provide an additional needed viewpoint with respect to the issues presented by this case.

STATEMENT OF THE CASE

This case addresses the issue of which plaintiffs have standing to challenge governmental actions taken pursuant to the Endangered Species Act. In *Bennett v. Plenert*, 63 F.3d 915 (9th Cir. 1995), the Ninth Circuit gave a very narrow answer to this question by ruling that only those plaintiffs alleging an interest in the protection and preservation of species have standing under the ESA.

The petitioners in this case are two Oregon ranchers and two irrigation districts that use water provided by the federal government's Klamath Project, which is operated by the United States Bureau of Reclamation (Bureau). In 1992, the Bureau became concerned that the operation of the Klamath Project may harm two species of fish listed as endangered under the ESA; the Lost River sucker and the shortnose sucker. The Bureau contacted the United States Fish and Wildlife Service (FWS) in order to determine whether the two species of fish were threatened by the continuing operation of the project. FWS prepared a biological opinion which concluded that the "long term operation of the Klamath Project was likely to jeopardize the continued existence of the Lost River and shortnose suckers." *Bennett*, 63 F.3d at 916. Among the mitigation measures suggested by the FWS in its opinion was the recommendation that the Bureau maintain minimum water levels in the

Klamath Project. The Bureau informed FWS that it intended to comply with this recommendation.

Petitioners filed suit in the United States District Court for the District of Oregon under the ESA's citizen suit provision. 16 U.S.C. § 1540(g)(1). Petitioners' complaint alleged that there was no evidence to support FWS' determination that the sucker fish were threatened by the operation of the Klamath Project. On the contrary, according to the petitioners, the two species of fish were reproducing successfully, and thus were not in need of federal protection. Specifically, the complaint charged that FWS had not complied with the consultation provisions of Section 1536(a), and that they had failed to consider the economic impact of their decision in violation of Section 1533(b)(2). In an unpublished decision, the District Court concluded that petitioners lacked standing to challenge the FWS determination and dismissed their suit.

On appeal the Ninth Circuit concurred with the District Court and held that only those plaintiffs "who allege an interest in the *preservation* of endangered species fall within the zone of interests protected by the ESA." *Bennett*, 63 F.3d at 919 (emphasis in original).[1]

Although recognizing that the Eighth Circuit had found that the ESA's broad citizen-suit provision "necessarily abrogated any zone of interest test," the Ninth Circuit held that notwithstanding the citizen-suit provision, Congress had not waived the zone of interests test with respect to actions brought under the ESA. *Id.* at 918 n.3. According to the *Bennett* court, because the ESA is "singularly devoted to the

[1] The Ninth Circuit only addressed the issue of whether petitioners were within the zone of interests protected by the ESA and did not determine whether they had satisfied the constitutionally based standing requirements. *Bennett v. Plenert*, 63 F.3d at 917.

goal of ensuring species preservation," *id.* at 920, plaintiffs alleging solely an economic or recreational interest are without standing to challenge governmental action taken pursuant to the ESA. Thus, the court held that petitioners in this case lacked standing. This decision is in conflict with decisions reached by other federal circuit Courts of Appeals, it conflicts with Supreme Court precedent and it raises important issues of federal law that should be resolved by this Court.

SUMMARY OF ARGUMENT

The Ninth Circuit opinion only adds to the confusion which currently exists among the federal circuits on the issue of whether the ESA citizen-suit provision evidences a congressional intent to waive the prudential zone of interest standing requirement. The Eighth Circuit has concluded that the broad language employed by Congress in drafting this provision has waived any zone of interest inquiry. Thus, plaintiffs filing suit under the ESA in the Eighth Circuit must only meet the requirements of Article III to have standing. The District of Columbia Circuit has applied the zone of interests test to actions filed pursuant to the ESA; however, the court has not yet defined exactly which interests are within the zone protected by the ESA. In *Bennett*, the Ninth Circuit held that the zone of interest does apply to the ESA and that only those plaintiffs alleging an interest in preserving or protecting species are within that zone. This Court should grant the writ of certiorari to resolve this conflict of authority.

The opinion of the Ninth Circuit also failed to properly apply the decisions of this Court which make it clear that Congress may waive prudential standing limitations. This Court has interpreted legislation similar to the citizen-suit provision at issue in this case and has determined that it

demonstrates a congressional intent to define standing as broadly as is permitted by Article III of the Constitution. Although the court below recognized congressional ability to supplant prudential standing elements, it held that despite the broad language used by Congress in drafting the ESA citizen-suit provision the zone of interest applies to suits filed under the Act. This ruling is in direct conflict with the decisions of this Court.

The opinion below also fails to effectuate congressional intent thereby raising issues of national importance which should be resolved by this Court. According to the Ninth Circuit the ESA is "singularly devoted" to the goal of preserving wildlife. While it is true that the ESA was enacted to protect and preserve species, this narrow reading of the ESA fails to recognize the numerous provisions of the Act adopted in order to protect economic interests. Passed in 1973, the ESA has gone through a series of amendments designed to incorporate a flexible approach to balancing species preservation with economic interests. The opinion rendered in *Bennett* fails to recognize that the plain language of the Act, as well as its legislative history, demonstrates that Congress intended to protect the economic interests of individuals such as the petitioners in this case.

ARGUMENT
REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

"The debates in the Constitutional Convention make clear that the purpose of the establishment of one supreme national tribunal was, in the words of John Rutledge of South Carolina, 'to secure the national rights & *uniformity of Judgments*.'" Chief Justice Vinson, Address Before the American Bar Association, Sept. 7, 1949, 69 S. Ct. v, vi

(emphasis added). Chief Justice Vinson's observations are codified in Supreme Court Rule 10.1(a) which lists among the considerations governing review on certiorari the circumstance when a United States Court of Appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter. Rule 10.1(c) includes as grounds for review when a United States Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court. Each of these grounds for review is present in this case.

I

THIS COURT SHOULD RESOLVE THE CONFLICT OVER WHETHER THE ZONE OF INTERESTS TEST APPLIES TO ACTIONS FILED UNDER THE CITIZEN-SUIT PROVISION OF THE ENDANGERED SPECIES ACT

In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), this Court held that the citizen suit provision contained in the ESA was not sufficient, in and of itself, to satisfy the requirements of Article III. This Court reiterated the now familiar standard that at an "irreducible constitutional minimum" the plaintiff seeking relief in the federal courts must establish an injury in fact, a causal connection between the injury and the conduct of the defendant, and that the injury is likely to be redressed by a favorable decision. *Lujan*, 504 U.S. at 560-61. This Court did not, however, address the issue of whether the ESA's citizen-suit provision waived the prudential standing requirement that the plaintiff be within the zone of interests sought to be protected by the statute in question. The United States Courts of Appeals

have split on this issue and two conflicting lines of authority have emerged. *Bennett v. Plenert* provides this Court with an opportunity to resolve the irreconcilable conflict of authority which currently divides the Circuit Courts.

The language employed by Congress in drafting the ESA's citizen-suit provision is without limits or ambiguity. The provision provides:

> (1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his behalf
>
> (A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof.

16 U.S.C. § 1540(g). Further evidence of congressional intent can be gleaned from the equally expansive definition of "person" found in the Act. That term is defined under the ESA to mean "an individual, corporation, partnership, trust, association, or any other private entity, or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State or political subdivision thereof, or of any foreign government." 16 U.S.C. § 1532(13). Despite the clear language used by Congress in drafting these provisions courts have reached extremely divergent views on whether this text is evidence of legislative desire to obviate the zone of interests inquiry.

The Eighth Circuit has concluded that the ESA's citizen suit provision "necessarily abrogated" the zone of interests standard. *Defenders of Wildlife v. Hodel*, 851 F.2d 1035,

1039 (8th Cir. 1988), *opinion after remand*, 911 F.2d 117 (8th Cir. 1990), *rev'd on other grounds*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555. In *Hodel*, the court began its analysis of the zone of interests question by recognizing the fundamental principle that Congress may eliminate the prudential standing requirements by legislation. *Hodel*, 851 F.2d at 1039 (citing *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979)). The court then examined the plain language of the Act's citizen suit provision and concluded that the text of that provision evidenced a congressional intent to waive the prudential standing requirements under the ESA. The ESA provides that "any person" may commence a suit to enjoin any person who is alleged to be in violation of the Act. 16 U.S.C. § 1540(g). According to the *Hodel* court, because the plaintiffs were "persons" as defined by the Act they needed only to satisfy the constitutionally based requirements in order to have standing under the ESA. *Hodel*, 851 F.2d at 1039. Although *Hodel* was eventually overturned by this Court in *Lujan v. Defenders of Wildlife*, nothing in this Court's *Lujan* opinion disturbed the Eight Circuit's conclusion that the plain text of the ESA waived the prudential zone of interests test.

The reasoning employed by the Eighth Circuit in *Hodel* is made exceptional only by its uniqueness. Other circuits have refused to rely on the plain language of the citizen-suit provision, and have decided that the broad language of that subsection does not provide sufficient evidence that Congress intended to waive the zone of interests test. The District of Columbia Circuit has held that the zone of interests test does apply to the ESA. *State of Idaho By and Thru Idaho Public Utilities Commission v. Interstate Commerce Commission*, 35 F.3d 585, 592 (D.C. Cir. 1994); *Humane Society of the United States v. Hodel*, 840 F.2d 45 (D.C. Cir. 1988). Although finding that the zone of interests test applies to actions filed pursuant to the ESA, the D.C. Circuit has yet

to clearly delineate the parameters of that zone. Significantly, unlike the Ninth Circuit in *Bennett*, the D.C. Circuit has not used the zone of interests inquiry to deny standing to plaintiffs asserting an economic injury under the ESA.

In *Bennett* the Ninth Circuit stated, "notwithstanding the broad language of the citizen-suit provision, we directly reject the plaintiffs' contention that it renders the zone of interests test inapplicable to claims brought under the ESA." *Bennett v. Plenert*, 63 F.3d at 918. The *Bennett* court then went a step further than the D.C. Circuit and held that only plaintiffs' alleging an interest in the *preservation* of species fall within the zone of interests protected by the ESA. *Bennett*, 63 F.3d at 919. Because the plaintiffs alleged no such interest they were outside of the ESA's zone of interest and, thus, without standing. The Ninth Circuit expressly recognized that its decision was patently inconsistent with the position taken by the Eighth Circuit, however, the court made no attempt to reconcile these two cases. *Bennett*, 63 F.3d at 918 n.3.

As it now stands, the ability to bring a claim under the ESA alleging an interest other than species preservation is entirely dependent upon the accident of geography. Plaintiffs suffering an economic injury under the ESA in the Eighth Circuit may look to the federal courts to vindicate their rights and protect their interests. Plaintiffs in the Ninth Circuit, suffering an identical injury, however, will find the court house doors closed to them. The Eighth Circuit has determined that the broad language of the citizen-suit provision waived the prudential zone of interests test and that plaintiffs need only satisfy the requirements of Article III in order to have standing under the ESA.. The District of Columbia Circuit has held that the zone of interests test does apply to the ESA, however, that court has yet to clearly define which interests fall within the zone. The Ninth Circuit has taken an extreme position and proclaimed that the

zone of interests test applies to ESA and that only plaintiffs alleging an interest in the preservation of endangered species have standing to challenge actions taken pursuant to the Act.

The United States Courts of Appeals are in disarray. *Bennett v. Plenert* provides this Court with an opportunity to settle the issue of whether the ESA waived the prudential zone of interests test. In the alternative, if this Court concludes that the zone of interests does apply, *Bennett* allows the Court the chance to clearly define which interests fall within the zone protected and regulated by the ESA. This Court should grant the petition for writ of certiorari to settle this conflict.

II

THE NINTH CIRCUIT'S OPINION IS IN CONFLICT WITH THE PRECEDENTS OF THIS COURT

One of the corner stones of the modern standing doctrine is the principle that Congress has the ability to waive the zone of interests requirement. This Court has explicitly recognized that "Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). In *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 154 (1970), the case which first defined with precision the zone of interests inquiry, this Court noted "Congress can, of course, resolve the question one way or another, save as the requirements of Article III dictate otherwise." Commentators have also recognized this fundamental principle: "The (prudential standing) doctrines, in any event, are wholly subject to supplantation by Congress, as long as disputes thus allowed remain of an otherwise justiciable nature." Laurence H. Tribe, *American Constitutional Law*, 135 (2d ed. 1988). The

court in *Bennett* acknowledged congressional ability to override the zone of interests requirement, however, the court concluded, "the fact that a statute contains a citizen-suit provision does not necessarily establish that Congress intended that any particular plaintiff have standing to assert a violation." *Bennett*, 63 F.3d at 919. This reasoning is inconsistent with previous holdings of this Court.

In *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972), this Court interpreted a provision of the Fair Housing Act that bears a striking resemblance to the citizen-suit provision at issue in the current case. The provision before the Court in *Trafficante* was Section 810(a) of the Civil Rights Act of 1968, which states in relevant part:

> Any person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur (hereafter "persons aggrieved") may file a complaint with the Secretary.

42 U.S.C. § 3610(a). Section 810(d) of the Civil Rights Act provides that if the Secretary is unable to secure voluntary compliance with the Act the person aggrieved may file suit in the appropriate United States District Court. Speaking for the Court, Justice Douglas recognized that the language employed by Congress in drafting this provision was "broad and inclusive." *Trafficante*, 409 U.S. at 209. This Court concluded that Section 810(a) demonstrated congressional intent to define standing as broadly as is permitted by Article III of the Constitution. *Id.*

Seven years later, this Court was again called upon to determine which plaintiffs had standing to bring suit alleging a violation of the Fair Housing Act. *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91. In this case, however, the Court was asked to interpret the reach of Section 812(a) of

the Civil Rights Act.[2] This Court stated: "Congress may, by legislation expand standing to the full extent permitted by Art III, thus permitting litigation by one 'who otherwise would be barred by prudential standing rules.'" *Gladstone*, 441 U.S. at 100 (quoting *Warth v. Seldin*, 422 U.S. at 501). Starting from this premise, this Court reached the inevitable conclusion that standing under this provision of the Fair Housing Act was "as broa[d] as is permitted by Article III of the Constitution." *Gladstone*, 441 U.S. at 109 (quoting *Trafficante*, 409 U.S. at 209). These cases leave no doubt as to congressional ability to expand the class of potential plaintiffs so long as it does not invade the "core" Article III based standing requirements. Unfortunately, the Ninth Circuit failed to apply this well-settled rule to the ESA citizen-suit provision. *Bennett* directly conflicts with both *Trafficante* and *Gladstone* and this Court should grant the writ to resolve this conflict.

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[2] Section 812 provides in part:

> (a) The rights granted by sections 803, 804, 805, and 806 may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction.

III

THIS CASE INVOLVES IMPORTANT ISSUES OF LAW THAT SHOULD BE RESOLVED BY THIS COURT

In analyzing the zone of interests test this Court explained, "at bottom the reviewability question turns on congressional intent, and all indicators helpful in discerning that intent must be weighed." *Clarke v. Securities Industries Association*, 479 U.S. 388, 400 (1987). This Court has stressed that the zone of interests test was "not meant to be especially demanding." Clarke, 479 U.S. at 399. The precedents of this Court also make clear that congressional intent is to be derived from both the language and the legislative history of the statute in question. *Barlow v. Collins*, 397 U.S. 159, 164 (1970); *Air Courier Conference of America v. American Postal Workers Union*, 498 U.S. 517, 524-26 (1991). In *Bennett* the Ninth Circuit held that because the overall purposes of the ESA are singularly devoted to the goal of ensuring species preservation, the Act does not embrace or protect economic interests. *Bennett*, 63 F.3d at 920. This conclusion completely ignores congressional intent by failing to acknowledge the numerous ESA provisions designed to protect economic interests, in general, and water rights, in particular. The importance of this case is grounded in the multitude of ESA subsections designed to protect economic interests which have been neglected by the Ninth Circuit's analysis in *Bennett*.

A. The Ninth Circuit's Opinion Ignores Congressional Intent to Protect the Rights of State and Local Water Districts

The plain language of the ESA clearly contemplates the importance of state and local water rights. In a statement of the Act's policy, the statute reads: "[I]t is further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species." 16 U.S.C. § 1531(c)(2). Congress recognized that the laudable goal of species preservation could potentially infringe upon the autonomy of local agencies with regard to water issues. In an attempt to strike a balance between species preservation on the one hand, and water rights on the other, Congress expressly mandated federal cooperation with local water districts. This provision provides compelling evidence that Congress intended water districts to fall within the boundaries of the ESA's zone of interests.

Two of the petitioners in this case, Langell Valley Irrigation District and Horsefly Irrigation District, are political subdivisions of the State of Oregon; more specifically they are local irrigation districts. These districts are the kind of "local agency" which Congress expressly declared the federal government should cooperate with to resolve water resource issues. In concluding that the water districts fell outside of the Act's zone of interests, the court failed to make any mention of this provision mandating cooperation between the different levels of government. Given the high priority Congress placed on the rights of local water agencies, and the need to balance water resources issues with species preservation, this Court should grant the writ of certiorari in order to effectuate congressional intent.

B. The Ninth Circuit's Opinion Ignores the Numerous ESA Amendments Designed to Protect Economic Rights

In addition to the preservation of water rights, the ESA also attempts to protect economic interests which might otherwise be trampled upon in the government's haste to protect threatened species of wildlife. Since its genesis in 1973, the ESA has evolved through a series of amendments which have incorporated a more balanced approach to species preservation. These amendments reflect a congressional understanding of the need for added flexibility in the Act's decision-making process. In 1978, the Act was amended to specifically mandate that the government consider economic factors in designating critical habitat for a species. 16 U.S.C. § 1533(b)(2). That provision declares: "The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the *economic impact*, and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2) (emphasis added).

In 1982 Congress further amended the ESA in an attempt to provide more economic protection under the Act. The most significant amendments added in 1982 created an exemption process to the ESA's taking prohibition which one commentator noted, "is the principle way in which economic considerations are intended to factor into application of the ESA." Ike Sugg, *Caught in the Act: Evaluating the Endangered Species Act, Its Effects on Man and Prospects for Reform*, 24 Cumb. L. Rev. 1, 37 (1993). The exemption process created the Endangered Species Committee, which is allowed to circumvent the strict takings prohibitions of the ESA if such action is found to be in the public interest. 16 U.S.C. § 1536.

The 1982 Amendments also offered relief to private property owners and other persons that might otherwise be adversely affected by strict compliance with the ESA's provisions. The amendments allow for the "incidental" taking of a listed species. 16 U.S.C. § 1539(a)(1)(B). An incidental taking is the taking of a species that occurs as the by-product "of carrying out an otherwise lawful activity." *Id.* With the Secretary's permission, such incidental takings are not considered a violation of the ESA. The legislative history behind this section provides clear evidence of what Congress intended to accomplish by enacting this provision.

> This provision establishes a procedure whereby those persons whose actions may affect endangered or threatened species may receive permits for the incidental taking of such species, provided the action will not jeopardize the continued existence of the species. *This provision addresses the concerns of private landowners* who are faced with having otherwise lawful actions not requiring Federal permits prevented by section 9 prohibitions against taking.

H.R. Rep. No. 567, 97th Cong., 2nd Sess. (1982) (*emphasis added*). Congress recognized that the interests of landowners in the productive use of their land may be in conflict with the goal of conservation. Rather than adopting a hard and fast rule against the "taking" of a species, Congress instead chose to steer a middle course between these two competing interests and adopted a flexible approach to the problem. *Id.* (Sections 6 (1) and (2) give the Secretary more flexibility in regulating the incidental taking of endangered species.) Thus, economics and reasonable property uses were made relevant interests to be considered and respected under the ESA.

This flexible approach is also found in the ESA amendments allowing for hardship exemptions. 16 U.S.C. § 1539(b). If the listing of a species will cause undue economic hardship to an individual who has entered into a commercial contract regarding that species, the Secretary may exempt that individual from the application of the ESA. *Id.* This subsection also makes special allowances for natives of Alaska, provided the taking is "primarily for subsistence purposes." 16 U.S.C. § 1539(e)(B). Congress understood the vast array of human activities which may be jeopardized in an unbridled attempt to preserve species and set out to provide a better mechanism to protect these activities. The reasoning employed by the Ninth Circuit in this case fails to recognize Congress' attempt to protect and preserve economic interests.

Any doubt as to the intent behind the 1982 revisions disappears upon reading the legislative history supporting those amendments. The House Report accompanying the 1982 amendments details the goals sought to be achieved by the Act:

> The Endangered Species Preservation Act of 1966 and the Endangered Species Conservation Act of 1969 preceded the 1973 Act to address the same problem, but it was the last statute which constructed a comprehensive means to *balance economic growth and development with adequate conservation measures.*

H.R. Rep. No. 567, 97th Cong., 2nd Sess. (1982) (*emphasis added*). The legislative history also traces the evolution of the ESA from 1973 through 1982:

> Subsequent to its passage, the Act was amended in 1976, 1978 and 1979 to increase the *flexibility*

> *in balancing species protection and conservation with development projects.*

Id. (emphasis added). Economic protection under the ESA reached its apex with the 1982 amendments. The provisions added in that year, as well as the legislative history explaining those provisions, demonstrate beyond all doubt that economic interests are within the zone of interests protected and regulated by the ESA. The Ninth Circuit's opinion fails to recognize these economic protections and leaves those plaintiffs suffering an economic injury without a remedy. This Court should grant the writ of certiorari to ensure that congressional intent to protect economic interests under the ESA is not ignored.

CONCLUSION

For nearly two centuries it has been axiomatic that "the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). The federal courts stand as a bulwark between the United States government and the rights of private citizens. If the petitioners in this case are denied standing to challenge this action the FWS would be given unbridled discretion under the ESA and would be immunized from judicial attack by those individuals forced to bear the burden of governmental regulations. Surely Congress could not have intended such an illogical and arbitrary result. The Ninth Circuit's decision is contrary to the decisions of other circuits and this Court. This Court

should grant the petition for writ of certiorari and give effect to Congress' intent to confer standing to the limits of Article III.

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Respectfully submitted,

*ROBIN L. RIVETT
*Counsel of Record
MARK T. GALLAGHER
Of Counsel
Pacific Legal Foundation
2151 River Plaza Drive, Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888

Attorneys for Amici Curiae